Waste Management of Arizona, Inc. *and* International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL–CIO. Cases 28–CA–18542, 28–CA-18543, 28–CA–18544, 28–CA–18848, and 28–CA–18902

December 9, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 16, 2004, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief to the General Counsel's answering brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified below, and to adopt the recommended Order as modified.

Background

The Respondent is a large trash-hauling company. It employs drivers who pick up waste from residential and commercial customers throughout the Phoenix metropolitan area. The Union conducted an organizing campaign among the Respondent's employees in 2001, but failed to receive a majority of the votes cast in a Board election. In mid-January 2003,[3] the Union again began to organize the employees at five of the Respondent's facilities in the Phoenix area.

February 10 Conversation Between Rush and Wonderling

Samuel Wonderling, a driver at the Respondent's Elwood facility, had been openly and actively opposed to the Union during the Union's 2001 campaign. In 2003, however, Wonderling actively supported the Union. Alan Rush, a route manager at the Respondent's Elwood facility, had been a driver and bargaining unit member during the 2001 campaign, when he also opposed the Union.

On February 10, Wonderling contacted Rush from his truck to inquire about his schedule. After Rush and Wonderling ended their discussion about Wonderling's schedule, Rush told Wonderling that he was aware that the employees had held a union meeting. Rush asked Wonderling for his assessment of whether the Union enjoyed sufficient support among unit employees to win an election. Wonderling replied that he felt uncomfortable discussing the Union over the Respondent's two-way radio in his truck, and asked Rush for his home telephone number, which Rush gave him.

Wonderling promptly called Rush at home and informed him that he, Wonderling, supported the Union.[4] The judge found that Rush unlawfully created the impression of surveillance by telling Wonderling that he was aware that employees had held a union meeting. We disagree.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions have been filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by coercively interrogating and threatening employee Troy Hoekstra with a loss of pay; expressing to Hoekstra the futility of seeking representation by a union; coercively interrogating employees Joe Packer, Kevin Harring, and Samuel Wonderling; promising benefits to Wonderling in exchange for his dropping his support of the Union; soliciting Packer's grievances and promising to remedy them; and threatening employees with more onerous working conditions and threatening to calculate their pay at reduced levels. Nor have any exceptions been filed to the judge's dismissal of other 8(a)(1) allegations.

[2] We need not pass on whether the Respondent coercively interrogated employee Samuel Wonderling on February 10. The violation would be cumulative in view of our adoption of the judge's uncontested findings of other coercive interrogations, above.

The judge found that the Respondent violated Sec. 8(a)(1) when it prohibited off-duty employees from distributing union literature in the parking lots of two of its facilities. We adopt the judge's finding of a violation. In doing so, however, we find it unnecessary to pass on whether the Respondent violated the Act when it prohibited distribution by employees who engaged in that activity at facilities other than where they worked. At each location where employees were prohibited from engaging in distribution, at least one of the affected employees was employed at that location. See *Town & Country Supermarkets*, 340 NLRB 1410, 1414 fn. 20 (2004).

Chairman Battista and Member Schaumber agree with the judge that the Respondent violated Sec. 8(a)(1) by discriminatorily enforcing its no-solicitation rule against employees because they were engaged in brief discussions about the Union. However, they find it unnecessary to rely on the judge's comments and case citations set forth in sec. III, I, pars. 10 and 12 of the judge's decision concerning the Board's distinction between union solicitation and other employee activity in support of union organizing.

[3] All dates refer to 2003, unless otherwise noted.

[4] Rush responded, "I thought I fired all of them and I tried to make sure they weren't one of them when I hired them." The judge found, and we agree for the reasons set forth in his decision, that Rush's statement was a threat in violation of Sec. 8(a)(1).

In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Flexsteel Industries*, 311 NLRB 257 (1993); *Schrementi Bros., Inc.*, 179 NLRB 853 (1969). The General Counsel has not shown that the union meeting was held in secret. Thus, Rush's statement that he knew that employees had held a union meeting would not have reasonably implied that Rush had monitored employees' activities, given the various other ways in which Rush might have learned of the nonsecret meeting. Rush did not say or even suggest that he had learned of the meeting in any covert manner, nor did he suggest that he had any detailed knowledge about the extent of the employees' organizing activity. Cf. *United Charter Service*, 306 NLRB 150 (1992).

Our colleague relies on the fact that Rush also said that he had fired the union supporters and tried to make sure that he did not hire any union supporters. Of course, the statement was an 8(a)(1) threat. However, it is unreasonable to leap from that statement to a finding of an unlawful impression of surveillance. More particularly, Wonderling would have to infer from the threat that the knowledge of union support came from spying on the union activity of the previous Saturday. Inasmuch as the purported actions (firing and not hiring union supporters) took place before the Saturday meeting, the inference is illogical.[5]

Thus, we find no merit in, and dismiss this complaint allegation.

Termination of Troy Hoekstra

Employee Troy Hoekstra had been an open and active union supporter from the beginning of the Union's 2003 campaign. Hoekstra was among a group of employees who distributed union flyers in the parking lots of two of the Respondent's facilities on February 20 and 22. The flyers listed Hoekstra as a union organizing committee member.

Hoekstra had also been the target of two of the Respondent's other 8(a)(1) violations in January and February.[6] On one of those occasions, Rush told Hoekstra that the employees who were trying to organize a union were "pussies," and that Hoekstra could not count on the employees to support him.

On February 21, Hoekstra received his paycheck for the previous 2-week period. Hoekstra believed that the Respondent had paid him less than he was owed. Hoekstra approached Route Manager Rush in the dispatch area of the Respondent's Elwood facility offices, and told him that the Respondent had not adequately paid him for the previous week. Rush responded by telling Hoekstra how management had calculated Hoekstra's pay, but Hoekstra did not accept Rush's explanation. He believed that the Respondent had reduced his pay in retaliation for his union activity.[7]

Hoekstra became belligerent, reacting to Rush's explanation by screaming statements such as: "this is f . . . . . bullshit"; "you're f . . . . . with me because we're for the Union"; "this isn't f . . . . . Rush Management." Rush repeatedly instructed Hoekstra to come into Rush's office to discuss the matter, but each time Hoekstra refused and cursed more loudly. Then, Hoekstra clocked out and left the facility. As Hoekstra left, he turned to Rush and said, "What comes around goes around." Several employees, including both unit employees and supervisors, witnessed Hoekstra's outburst, which occurred in an area of the Respondent's facility where employees gathered at the end of the workday to complete paperwork prior to clocking out and leaving work. The Respondent terminated Hoekstra 4 days later.

The General Counsel alleges that the Respondent terminated Hoekstra for his union activity. Applying the criteria that the Board articulated in *Atlantic Steel Co.*, 245 NLRB 814 (1979), the judge dismissed the allegation. The judge reasoned that, even if Hoekstra was engaged in protected activity when he complained that the Respondent had reduced his pay in retaliation for his union activity, Hoekstra lost the protection of the Act by engaging in opprobrious and abusive conduct. We agree with the judge's conclusion, but do not believe that it completely responded to the General Counsel's contention. Insofar as the General Counsel argues that the real reason for the discharge was Hoekstra's outbursts, and that such outbursts were not outside the protection of the Act, the judge's finding responds to it, viz. the outbursts were outside the protection of the Act. However, insofar as the General Counsel contends that the real reason for the discharge was Hoekstra's prior union activity we must conduct an analysis under *Wright Line*, 251 NLRB

[5] We do not say that the threat was irrelevant to the allegation of impression of surveillance. We simply say that the threat does not establish that allegation. Further, Rush's question about the strength of the Union's support, far from creating an impression of surveillance, suggests that Rush was in the dark as to this matter, i.e., that he was not surveilling.

[6] See fn. 1, supra.

[7] The General Counsel alleged that the Respondent violated Sec. 8(a)(3) and (1) by reducing Hoekstra's pay in retaliation for his union activity. We adopt the judge's recommended dismissal of that allegation.

1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

To establish a violation of Section 8(a)(3) under *Wright Line*, the General Counsel must make an initial showing that the employee's union activity was a motivating factor in the employer's adverse action against that employee. To meet that burden, the General Counsel must show that the employee engaged in union activity, that the employer was aware of that activity, and that the employer had animus toward the employee's protected conduct. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB No. 124 (2004). Proof of an employer's animus may be based on circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices. *Amptech, Inc.*, 342 NLRB No. 117, slip op. at 5 (2004).

We find that here, the General Counsel has met that burden. The Respondent was well aware of Hoekstra's ongoing union activity. Given that knowledge, the Respondent's contemporaneous commission of other unfair labor practices is sufficient to establish antiunion animus. The inference that antiunion animus was a substantial or motivating factor in the Respondent's decision to discharge Hoekstra can fairly be drawn because, as explained above, Hoekstra was the specific target of two contemporaneous unfair labor practices.

Once the General Counsel has met that burden, the employer may contradict or meet the General Counsel's case, or demonstrate that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. We agree with the judge that the Respondent has shown that it would have taken the same action in the absence of the protected conduct. Hoekstra screamed profanities at Rush in a crowded work area, and repeatedly refused to speak to him in private, preferring to loudly curse at him in front of other employees. His conduct was insubordinate, it disrupted the workplace, and undermined Rush's supervisory authority.

Our dissenting colleague notes that Hoekstra had been the object of 8(a)(1) remarks and a prior pay shortage. However, neither of these was the cause of his outburst. The outburst was caused by the dispute concerning less pay for fewer hours because of bad weather. There is no claim that this reduction in pay was unlawful. Nor was it substantial. Further, we agree with the judge that the General Counsel did not demonstrate that the Respondent's discipline of Hoekstra was disparate. Although the General Counsel introduced evidence showing that the Respondent's employees often used profanity in the workplace, and that the Respondent had tolerated some insubordination from employees in the past, the General Counsel did not show that the Respondent tolerated behavior comparable to Hoekstra's.[8]

We conclude that the Respondent did not violate Section 8(a)(3) and (1) by terminating employee Hoekstra, because the Respondent established that it would have terminated Hoekstra, even absent his union activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Waste Management of Arizona, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 9, 2005

Robert J. Battista Chairman

Peter C. Schaumber Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

In finding that Route Manager Alan Rush did not create an unlawful impression of surveillance, the majority fails to grasp the impact of Rush's statements to employee Thomas Wonderling, when those statements are considered together. The majority also errs in finding that the Respondent established that it would have discharged Troy Hoekstra–an open and active union supporter, with a spotless employment record, who was admittedly the victim of several unfair labor practices–even in the absence of his union activity.[1]

[8] For example, another employee testified that, in the privacy of an office, he had called Rush a liar and "thick-headed." In our view, that conduct was not comparable to Hoekstra's more public and sustained outburst.

[1] I agree with the majority with respect to the other complaint allegations.

The majority finds it unnecessary to pass on "whether the Respondent violated the Act when it prohibited distribution by employees who engaged in that activity at facilities other than where they worked." I agree, but would point out that the Board has held, with the approval of the courts, that under Sec. 7 of the Act, offsite employees have nonderivative access rights to outside, nonworking areas of their employers' property. See *ITT Industries*, 341 NLRB No. 118, slip op. at 3 (2004), enfd. 413 F.3d 64 (D.C. Cir. 2005); *Hillhaven Highland House*, 336 NLRB 646, 648–649 (2001), enfd. 344 F.3d 523 (6th Cir. 2003).

Impression of Surveillance

The judge found, on the basis of his credibility determinations, that during a phone conversation Rush told employee Wonderling that he "knew there had been a union meeting" the previous Saturday, and asked whether the Union had enough support to win bargaining status. In a second phone conversation almost immediately afterward, when Wonderling told Rush he had become a union supporter, Rush replied that "I thought I fired all of them and I tried to make sure they weren't one of them when I hired them." As the majority recognizes, Rush's reply was an unlawful threat and independently violated Section 8(a)(1). But the majority finds, contrary to the judge, that Rush's comment that he knew about the union meeting would not have created an impression that union activity was under surveillance. I need not decide whether Rush's comment alone was unlawful, as it was made in the context of other statements, which would leave no doubt that Rush had been surveilling the employees' union activities in order to identify and fire union supporters: Rush not only told Wonderling that he knew about the union meeting, but also that he thought he had been successful in firing all of the union supporters and that he had tried to make sure that he did not hire any union supporters. He also asked Wonderling about the strength of the Union's support. These statements, considered together, strongly suggested that Rush's knowledge of the union meeting was acquired as part of his ongoing campaign to closely monitor the employees' union activities.[2] Accordingly, I would find a violation of Section 8(a)(1).[3]

Discharge of Hoekstra

The majority correctly finds that the *Wright Line*[4] test applies to Hoekstra's discharge and that the General Counsel has met his initial burden of establishing that the Respondent's antiunion animus was a motivating factor in the discharge. Contrary to the majority, I would find that the Respondent has *not* met its burden of showing that Hoekstra would have been terminated on this occasion even if he had not engaged in union activity.

It is undisputed that Hoekstra was an open and active union supporter. In addition, as the majority notes, he was the target of at least three of the Respondent's violations of Section 8(a)(1) during the union campaign: an unlawful interrogation, a threat of loss of pay, and a threat of futility of organizing.

In November 2002, 3 months before his discharge, Hoekstra received a paycheck for less than he was entitled to receive. This was corrected after he complained to management. On February 21, 2003, however, Hoekstra found that his paycheck again was lower than he believed he was due. He approached Route Manager Rush in the hallway near the dispatch office, where several other employees were present. Rush told Hoekstra that his paycheck was reduced because he had driven fewer hours due to bad weather. Hoekstra lost his temper and yelled that this was "f–king bullshit"; "you're f–king me because we're for the Union"; "this is not f–king Rush Management"; "you can't f–king do this"; and "this is f–king wrong." During this outburst, Rush told Hoekstra several times to come to his office to discuss the matter. Hoekstra did not comply, and finally walked away. He was terminated for this incident 4 days later.

As noted above, Hoekstra had previously been unlawfully interrogated and threatened by Rush, and he was unlawfully threatened with loss of pay. He had also previously received less pay than he had earned, not long before the February 21 incident. Rush's unlawful harassment of Hoekstra, the unlawful loss of pay threat, and what appeared to be a second pay shortage certainly established a degree of provocation. Given this, the fact that workers often used profanity in the workplace, and Hoekstra's spotless employment record (he was a 7-year veteran with excellent evaluations and no prior disciplinary record), I do not accept that the Respondent would have fired Hoekstra over this one incident, even if he had not been a union supporter. Especially in light of Respondent's clearly expressed intent to fire all union supporters, I would find that the discharge of Hoekstra, an open and active union supporter, violated Section 8(a)(3).

Dated, Washington, D.C. December 9, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[2] In the majority's view, Rush's statement to Wonderling–that he thought he had fired all of the union supporters and had tried to make sure not to hire any of them–is irrelevant to whether Rush created the impression of surveilling *the union meeting*, because the firings and failure to hire union supporters predated the union meeting. But, Rush's statement clearly makes the point that Rush had made an ongoing effort to keep track of who was a union supporter, which certainly adds to the impression that Rush was surveilling union activity.

[3] See, e.g., *Spartech Corp.*, 344 NLRB No. 72, slip op. at 1 (2005) (impression of surveillance created by statement that employer official knew who had attended union meeting).

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees concerning their union sympathies or activities.

WE WILL NOT threaten employees with reduced pay, benefits, or onerous working conditions if they select the International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL–CIO, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT threaten to discharge or to refuse to hire union supporters.

WE WILL NOT solicit employee grievances and promise employees improved wages, benefits, or better working conditions if they withhold support from the Union.

WE WILL NOT promulgate and enforce discriminatory no-solicitation and no-distribution rules and remove union literature from employee vehicles parked in our parking lots.

WE WILL NOT promulgate or enforce a discriminatory rule that prohibits employees from discussing the Union during working time or threatening employees with stricter enforcement of our no-solicitation rules.

WE WILL NOT threaten employees with unspecified reprisals for engaging in union activity.

WE WILL NOT disparately enforce our policy prohibiting employees from wearing hats other than Waste Management hats.

WE WILL NOT tell employees that it would be futile for them to support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL rescind, revoke, and cease enforcing the discriminatory, overly broad no-solicitation and no-distribution rules against employees.

WE WILL rescind the discriminatory rule prohibiting employees from discussing union matters at work, while permitting all other discussions.

WASTE MANAGEMENT OF ARIZONA, INC.

Sandra L. Lyons, Esq. and *Johannes A. Lauterborn, Esq.,* for the General Counsel.

Charles L. Fine, Esq. and *Laurent R.G. Badoux, Esq.,* for the Respondent.

Kathy Campbell, for the Charging Party.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. The issues presented are whether the Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is engaged in the business of waste management services to commercial, governmental, and residential customers in the Phoenix, Arizona area. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party Union (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by reducing the pay of Troy Hoekstra and discharging Hoekstra and David Keene because of their activities on behalf of the Union. It is further alleged that the Respondent committed numerous violations of Section 8(a)(1) of the Act including promulgation and enforcement of certain employment rules, unlawful interrogation, threats, soliciting grievances, voicing the futility of union representation, and creating the impression of surveillance of employees' union activities.

The Respondent employs drivers who pick up waste from various types of containers throughout the Phoenix metropolitan area. The Respondent has five facilities which are referred to as Elwood (South Yard), Port-o-let (19th Ave.), Chandler, Container (32nd St.), and North Yard (Williams Road). The Respondent also operates a transfer station near the Phoenix Sky Harbor Airport where drivers dump their waste. Each location is directed by a district manager. Under the district managers are several route managers that supervise the drivers and routes that operate out of that facility. In 2001, the Union conducted an organizing campaign among the Respondent's employees. An election was eventually held and the Union failed to receive a majority of the votes. In late 2002 several of Re-

[1] This case was heard at Phoenix, Arizona, on January 26–29, February 17–19, and April 6, 2004. All dates in this decision refer to 2003 unless otherwise stated.

[2] 29 U.S.C. § 158 (a)(1) and (3).

spondent's Elwood employees started discussing the possibility of again organizing the Respondent's workers. In mid-January 2003 employees Sam Wonderling and Tim Peek contacted Kathy Campbell, the Union's organizer, about obtaining union representation. Campbell told them that they should form an organizing committee and test the employees' interest in having the Union represent them. The committee was created, the employees began actively discussing the Union, meetings were held with the Union and union flyers were passed out by the organizing committee. Among the employees named in the flyers as organizing committee members were Kevin Harring, Mark Keene, David Keene, Joe Packer, Andy Romero, Troy Hoekstra, Tim Peek, and Sam Wonderling.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. January 20–Rush

Alan Rush was a route manager at the Elwood facility from September 2001 until July 2003, when he was transferred to the Chandler facility. On or about January 20, 2003, employee Troy Hoekstra went into Rush's office to look at the vacation calendar. Hoekstra testified that he and Rush were discussing the vacation schedule when Rush asked him: "What do you think of this union shit?" Hoekstra told Rush that he was happy with everything he had at Respondent but wanted it in a legal binding contract. Rush said "You know, if the union comes in here, you guys will be making Valley-wide average. Troy, do you think on $14 an hour you can afford your cabin in Flagstaff?" (Hoekstra had a cabin in Northern Arizona that he and Rush had discussed previously.) At the time of the conversation, Hoekstra was making $19.23 an hour. Rush then changed the subject, asked Hoekstra for some cigarettes, and proceeded to follow Hoekstra out to his truck in the parking lot. Hoekstra recalled that Rush then told him that he had just watched a program about Consolidated Freight, a trucking company, where the employees had been locked out, and even Jimmy Hoffa, the president of the Teamsters, was not able to do anything for them. Rush testified by way of general denial that he had said any of the things attributed to him by Hoekstra.

Hoekstra's demeanor and detailed testimony of what was said to him by Rush impressed me as being truthful and accurate. His testimony is contrasted with Rush who left the sense of one who was not offering a complete picture of what he knew and was not forthcoming in his recitation of events. I credit Hoekstra as to what Rush said to him.

The General Counsel alleges that Rush's question to Hoekstra about the Union was unlawful interrogation and his reference to $14 wages was a threat to reduce his pay if the Union was selected as the employees' collective-bargaining representative. In determining if an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984). The Board has applied a "totality of the circumstances" test to interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). The areas of inquiry are the background, the nature of information sought, identity of the questioner, and the place and method of interrogation. Id. Rush questioned Hoekstra privately in his office and it was not shown at the time that Hoekstra had publicized his support for the Union. Rush was a supervisor and was clearly attempting to ascertain what Hoekstra's union sympathies were. Under all of the circumstances, I find that this interrogation was unlawful and violated Section 8(a)(1) of the Act. I further find that the Rush's reference to how Hoekstra would like trying to live on wages that were reduced $5.23 an hour was a threat suggesting that if the employees selected the Union to represent them he could look forward to that type of loss of pay. I conclude this threat violated Section 8(a)(1) of the Act.

B. Late January and February 10–Rush

In approximately late January 2003, employee Joe Packer was in Rush's office to discuss his performance evaluation. Packer testified that after they finished talking about the evaluation Rush asked him how he felt about the Union. Packer told Rush that he was from New York where there are a lot of unions and he would look at both sides and would make his own decision.

Employee Sam Wonderling testified that while working his route on or about February 10, 2003, he called Rush on his radio to discuss a concern he had about a Sunday schedule. The two men concluded their discussion about that matter and then Rush said that he knew there had been a union meeting on Saturday and asked Wonderling if the numbers were "strong enough." Wonderling testified that he was uncomfortable talking to Rush over the radio and thus asked him for his home phone number so he could call Rush back. Shortly thereafter Wonderling did telephone Rush at his home. He told Rush that he had switched sides and was now supporting the Union. Wonderling recalled that Rush responded, "I thought I fired all of them and I tried to make sure they weren't one of them when I hired them." Wonderling asked Rush if he had heard what he had just said, that he was on the Union's side this time. Rush said he had heard Wonderling. Wonderling then said that he had told Rush in the previous union campaign that if the Respondent did not start treating the drivers right, he would be sitting on the other side of the table from the Company. Rush replied, "The Company lost one hell of an ally."

In the early part of February employee Kevin Harring was driving on his route when Rush radioed him. According to Harring, Rush said he wanted to get the "run down" of how Harring felt about the Union. Harring told Rush he was not comfortable talking about the subject and Rush said that was fine and he would discuss it later with him when he was back at the facility.

Harring testified that he attempted to avoid Rush after their conversation but about 2 weeks later Rush saw him talking to another supervisor, Jim Sargeant, and asked Harring to come to his office. Harring and Rush then went into the office. Harring testified that Rush asked him how he felt about the Union. Harring replied that he was for the Union. Rush stated that the union rules were harsher than company rules and that if Harring thought the rules were strict now, they would be a lot stricter with the Union. Rush also said that the Respondent would have to take a Valley average for pay and start there for negotiations.

Rush also said that a union steward would be one more person that knew their business that did not know about it now. Rush asked Harring what the issues were. Harring testified he told Rush he had some issues with the working conditions, including the rising cost of benefits to employees. He also told Rush of his disappointment with having attended classes about hauling special waste so he would earn more money. The special waste assignment, however, had not materialized. Rush asked how much more money was he expecting to make by hauling the special waste and Harring told him a couple of dollars more. Harring testified that Rush asked if he got Harring a couple more dollars an hour, would it "make this go away." Harring responded only by shrugging his shoulders. Rush told Harring that he had been for the Union at one time but when he weighed the positives and the negatives about the Union, the Respondent came out better.

Rush recalled having a conversation with Harring on February 12 in which they discussed Harring's dissatisfaction about not getting more pay after taking the special waste classes. Rush testified that he knew nothing about the special waste matter but he told Harring he would check on it for him. Rush then spoke to District Manager Jim Sergeant, about the matter and was told the Respondent was not implementing the special waste program at that time and no employee would be paid more since the program was not in effect. Rush testified that he later passed this information on to Harring. Rush denied that he ever promised benefits to any employee if the employees would reject representation by the Union. Rush denied at any time asking Harring, Packer, Wonderling, or any other employee, if they supported the Union.

Packer, Wonderling, and Harring impressed me as having very good recollections of their conversations with Rush, including questioning them as to their union sympathies and employees' union activities. I found Rush not to be candid in his version of events and his denials of committing any unfair labor practices. I do credit Packer, Wonderling, and Harring and find that, as they testified, they were interrogated by Rush. I find that under all the circumstances these interrogations were violations of Section 8(a)(1) of the Act. *Rossmore House,* 269 NLRB 1176 (1984). I further find that Rush's asking Harring if he could get him increased pay if that would make the union situation go away, what the issues were, threatening employees with more onerous working conditions and calculating their pay at a reduced level for purposes of negotiation if the Union represented them, are all unlawful conduct that tends to restrain, coerce, and interfere with employees' union activities. I conclude all of this conduct violated Section 8(a)(1) of the Act.

I additionally find that Rush did inform Wonderling that he knew of the union meeting on Saturday and asked him if the union support among employees was strong enough. I conclude that Rush stating to an employee that he knew of the union meeting reasonably suggested to the employees that the Respondent was closely monitoring their organizing efforts and thus unlawfully created the impression that employees' union activities were under surveillance. I find this creation of the impression of surveillance is a violation of Section 8(a)(1) of the Act. *United Charter Service*, 306 NLRB 150 (1992); *South Shore Hospital*, 229 NLRB 363 (1977); *Schrementi Bros., Inc.*, 179 NLRB 853 (1969). Likewise, Rush's statement concerning firing and not hiring union supporters was a threat that employees supporting union representation would be terminated or not hired. I conclude that these threatening statements are also violations of Section 8(a)(1) of the Act.

C. February 11 & 12–Rush

On or about February 11, 2003, Wonderling was driving his route when Rush called him on the radio. Rush again asked Wonderling if the numbers were strong enough, and Wonderling replied that he did not know. Rush then asked what it would take to get Wonderling over to "our team." Wonderling understood that Rush was asking him what did he want in order to get him to support the Respondent rather than the Union. He told Rush that to change his support would reflect on his credibility.

The following day Wonderling was in his truck and engaged in a cell phone conversation with Union Organizer Kathy Campbell. With Campbell still on the phone, Wonderling called Rush on his truck radio. Campbell was able to hear the conversation between Rush and Wonderling. Wonderling asked Rush if "the deal" was still open–referring to the previous day's conversation where Rush had asked Wonderling what it would take to get Wonderling to switch sides. Rush replied that the deal was still open. Wonderling said that there were three things he wanted to see happen before he would switch sides. Wonderling told Rush that he wanted his seniority calculated with credit for having worked for a previous owner of the Respondent's business (Browning Ferris Industries), he wanted to be assigned a new truck that Respondent had just received, and he wanted his friend, Gilbert Garcia, who had been fired by the Respondent, to be eligible to return to work in 6 months instead of the usual 1 year. Rush told Wonderling he would get to work on those items the first thing that morning. Rush did go to higher supervision regarding Wonderling's desires but was told in effect that nothing could be done to satisfy the requests. Later in the day Rush invited Wonderling into his office and told him that he had looked into the three things that he had asked for and did not have an answer for him regarding the seniority. Rush said that the only way to get a new truck was to take over a route instead of being a relief driver, and that it was a corporate policy that Gilbert Garcia would have to wait one year to reapply for work.

I credit Wonderling's testimony of his conversations with Rush and note that his second conversation was overheard by Campbell who corroborated what Rush said. I find that Rush did interrogate Wonderling about the employees union support and probed him as to what it would take to not support the Union. Rush confirmed the next day that his "offer" to provide benefits to Wonderling in exchange for his dropping support of the Union was extant and Rush admitted following up on these subjects. I find that Rush's interrogation and promise to seek to satisfy Wonderling's requests tended to interfere with, restrain and coerce employees in their union activities. I conclude that by theses actions the Respondent violated Section 8(a)(1) of the Act.

D. February–No-Distribution Policy

The General Counsel alleges that on various dates in late February 2003 some of Respondent's supervisors promulgated an overly broad and discriminatory no-distribution rule that prohibited employees from distributing union literature on the Respondent's premises and unlawfully removed union flyers from employees' vehicles parked in the Respondent's parking lots. The Respondent cites its no-solicitation policy as justification for prohibiting such placement of flyers and for excluding off duty employees from the parking lot for such purposes. The record shows that the Respondent has signs posted at its Phoenix facilities that state "no-solicitation." There are also no trespassing signs at the Respondent's Port-a-let and North Yard locations. The Respondent published a letter to all of its Phoenix area employees on January 1, 2003, that set forth the following company policy regarding the distribution of materials. Also, employees may not distribute non-Waste Management literature or leaflets of any kind . . . during working time, in the work area or anywhere on Waste Management property, except for Waste Management sponsored charities. (R. Exh. 6.)

1. February 20 Port-a-let facility

On February 20 several of Respondent's employees went to the Port-a-let facility in order to distribute union flyers at both entrances to the facility. The flyers were addressed to "Dear Fellow Co-worker," explained the employee organizing committee's purpose and invited employees to a union meeting. Union Organizer Kathy Campbell and Tim Peek, an employee who works out of the Elwood facility, arrived and placed the flyers on the windshields of employees' cars that were in the company parking lot. The parking lot is the Respondent's private property but is not considered a work area. The union supporters then stood at the entrances to the property and proceeded to pass out the flyers to employees. Facility Manager Steve Fanning at the Port-a-let facility, and two other managers, John Delaware and Mike Bartell, watched the union supporters for awhile and then Fanning and Bartell started taking the union flyers off of employee vehicles in the parking lot. Fanning then approached Campbell and several employees and told them to stay off the property, and Campbell replied that she knew what the rules were. Fanning then returned to the area of the employee vehicles and continued taking flyers off the vehicles. Peek testified that Bartell approached the group of employees with whom he was standing on the sidewalk. Bartell told them to stay off the property. Peek replied that they were not on the property but were on the sidewalk.

2. February 22 North Yard

On February 22 employees and union officials arrived at Respondent's North Yard facility in order to pass out the union flyers. Campbell and Peek again placed a copy of the flyer on each vehicle in the parking lot. The employees and union representative then stood outside the facility and gave flyers to employees entering or exiting. Rod Hansen, a front-load route manager at the North Yard, came out of the office and walked toward a group of union committee members who were standing across the street. As he approached the group, Hansen took several flyers off the vehicles in the parking lot. Hansen came up to the group and told them there was a no-solicitation policy and they were not allowed on the property. Hansen said they had 15 minutes to remove all the flyers from the cars in the parking lot. Campbell said that she was not going back on the property. Hansen told Campbell he was going to call someone, and Campbell told him to do what he had to do. Hansen then left and went to the parking lot where he removed all of the remaining flyers from the vehicles in the parking lot.

The Board has stated that, "[a] no-solicitation rule is lawful so long as its prohibition is confined to periods when employees are performing actual job duties, periods which do not include that employee's own time such as lunch and break periods." *Clinton Electronics Corp.*, 332 NLRB 479, 497 (2000) (citing *Our Way, Inc.*, 268 NLRB 394, 395 (1983)). *Our Way* also applies to cases involving rules prohibiting or placing limitations on distribution. *Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000); *Titanium Metals Corp.*, 340 NLRB 766, 767 (2003). "Interference with employee circulation of protected material in non-working areas during off-duty periods is presumptively a violation of the Act unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interest." *Champion International Corp.*, 303 NLRB 102, 105 (1991) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)). "Indeed, the mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline." *Grand-view Health Care Center*, 332 NLRB 347, 348 (2000) (citing *Ingram Book Co.*, 315 NLRB 515, 516 (1994); *J.C. Penney Co.*, 266 NLRB 1223, 1224 (1983). In order to defeat this presumption of illegality of its overly broad rules, an employer must show a compelling and legitimate business reason necessitating the rule. *Midland Transportation Co*., 304 NLRB 4, 5 (1991).

The Respondent's written no-distribution rule broadly prohibits employees from distributing "during working time, in the work area or anywhere on Waste Management property." Peek, an off-duty employee, along with a union representative, had placed union flyers on employees' vehicles in the Respondent's parking lots. The off-duty employees were told by Respondent's supervisors that they were prohibited from distributing their flyers in the parking lots, a nonwork area, and the employees were told to stay off of the property. The written rule and its interpretation as it applied to the employees were overly broad and contrary to the Board's construction of such rules. The Respondent adduced no evidence to establish a compelling and legitimate business reason necessitating the rule. I further find the fact that employee Tim Peek did not work at the locations where he entered the parking lots to distribute flyers does not make the Respondent's no-distribution policy applicable as a no access rule as the Respondent argues. The Board has held that off-site employees of an employer may have access for protected activities. *Eagle-Picher Industries*, 331 NLRB 169 fn. 2 (2000) (Employer unlawfully maintained a work rule that prohibited off-duty and off-site employees from gaining access to its parking lots and other nonwork areas.) I conclude that the supervisor's statements to the employees on February 20 and 22, 2003, their taking of the union flyers and thus the enforcement of the Respondent's overly broad no-distribution rule

were all unlawful and violate Section 8(a)(1) of the Act. *Waste Management of Palm Beach*, 329 NLRB 198, 199–200 (1999) (Employer violated the Act by prohibiting employees from soliciting and distributing literature in its parking lot.)

E. February 22–Rodriguez

Robert Rodriguez is a route manager at the Elwood facility. On February 22, 2003, he was at the North Yard facility. Employees, who were distributing union flyers at both entrances, observed Rodriguez drive into that facility through one of the entrances, go into the office and eventually exit through the other gate. Rodriguez credibly testified that he was at the Elwood location that day to drop off some personnel papers concerning a new employee.

The General Counsel alleges the fact that Rodriguez was at the North Yard, a location where he did not normally work, was unlawful surveillance of employees' union activities. I find that the credible evidence shows that Rodriguez was at the facility for legitimate business reasons, that he did nothing unusual regarding noting or recording the employees union activities and that, therefore, the General Counsel has failed to show by a preponderance of the evidence that he engaged in any unlawful surveillance of the employees' open union activities at that facility. *Roadway Package System*, 302 NLRB 961 (1991); *Southwire Co.*, 277 NLRB 377, 378 (1985); *Schnadig Corp.*, 265 NLRB 147, 157 (1982); *Porta Systems Corp.*, 238 NLRB 192 (1978). I conclude that Rodriguez' presence at Elwood on February 22, 2003, did not violate Section 8(a)(1) of the Act.

F. Late February–Rush

Employee Joe Packer was dumping a waste load in at the 40th street transfer station in late February and he noticed Rush talking to some individuals he did not recognize. Packer testified that Rush subsequently approached him and said he wanted to speak to him about the Union and what was going on with it. Packer told Rush he was not supposed to be asking him about the Union, and Rush told him that he could ask him about the Union, as long as he did not bad-mouth the Union. Rush proceeded to ask Packer what the issues were, why the employees wanted a union and why the employees were upset. Rush said he wanted to know what the issues were to fix them so the employees could be happy. Packer did not respond and let Rush continue to talk. Rush then summoned a labor relations specialist by the name of Sal Duarte over to talk to Packer. Duarte had been brought in by Respondent from its corporate headquarters to talk to employees about benefits and go on ride-a-longs with employees. Rush continued to talk to Packer, with Duarte present, about what the issues were and what it would take to make the employees happy. Packer stated that the conversation took almost an hour and a half, and Rush instructed him to put down the time spent as a meeting with a supervisor.

Rush admitted that he had the discussion with Packer but recalled that he asked him, "how it was going and what he felt about what was going on right now." He recalled Packer saying that Rush could not ask him that. Rush asked what question Packer thought he was talking about and Packer told him he thought he was asking about the union organizing. Rush testified he then explained that he was not talking about the Union but about benefit changes. Rush also recalled they talked about the weather, the attendance policy and what Packer thought of how Rush was performing his job. Packer responded that he thought Rush was unapproachable and did not have an open door policy. Rush replied he did want to talk to employees about their problems. Rush denied asking Packer if he supported the union organizing efforts or asked him to provide him with information about the organizing effort. Sal Duarte did not testify at the hearing. In assessing the demeanor of these two witnesses regarding this incident I found Rush was not forthcoming. He left the impression that he was trying to put the best light on what he said. Packer, in contrast, impressed me as being certain of what was said and having a good recollection of the unusual nature of his conversation with Rush during his work shift. I credit Packer's version of what was said regarding Rush's questioning him about what was going on with the Union and why the employees wanted union representation. I find that under all the circumstances such interrogation was unlawful and a violation of Section 8(a)(1) of the Act.

Rush's probing of Packer about what the issues were that concerned the employees so he could correct them and make the employees happy was unlawful. *Woodbridge Foam Fabricating*, 329 NLRB 841 (1999) (An employer may not solicit grievances from employees with the express or implied promise to remedy them.) *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Foamex*, 315 NLRB 858, 858 (1994); and *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). I find that Rush's comments were an unlawful solicitation of grievances from employees and a promise that the Respondent would seek to address these concerns in order to get the employees to withdraw their support for the Union. I conclude that Rush's conduct was a violation of Section 8(a)(1) of the Act. *Maple Grove Health Care Center*, 330 NLRB 775 (2000); *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

G. End of February–Sergeant

Paragraph 5(l) of the complaint alleges that on or about the end of February Respondent's district manager, Jim Sergeant, committed the following violations of the Act: (1) Informed employees that it would be futile for them to select the Union as their collective-bargaining representative, and, (2) Threatened employees that the Respondent would not negotiate with the Union if the employees selected it as their collective-bargaining representative. The evidence offered in support of this allegation consisted of the testimony of employee Joseph Packer. He testified that he attended a safety meeting held by Sergeant at the Elwood facility around the end of January. Packer recalled that about 25–30 employees attended and that, along with Sergeant, Supervisor Robert Rodriguez was also present. Among other things the employees were shown an antiunion film followed by comments from Sergeant. According to Packer, Sergeant told the employees that management had made some mistakes, they were only human, and management would probably make mistakes in the future, but he had an open-door policy and anytime employees had a problem they could talk to him. Packer also recalled that Sergeant told them they "could gain more than we expected or we . . . can get

less than what we expected, you just don't know, but they didn't really . . . have to sit down and negotiate with the union."

Sergeant denied making any statements attributed to him about it being futile for the employees to select the Union as their representative and not negotiating with a union. He testified that he had been through previous union organizational campaigns at the Respondent and had been trained in what supervisors could and could not say to employees. Sergeant also testified without contradiction to other occasions when he had told employees he would defend their rights to do whatever they needed to do regarding union representation, but that he thought they did not need such representation. He also had told employees that they knew what they had now in terms of their work situation and they did not know what they would gain or lose in the negotiation process.

The resolution of exactly what was said is clouded by the fact that no party called any of the approximately 30 other individuals in attendance at the safety meeting to testify as to their recollections of what was said. I found Packer's account of what Sergeant allegedly said to be doubtful because, even according to his recollection, Sergeant advised the employees that negotiations could yield more or less than what they expected from union representation. This is somewhat inconsistent with the later statement Packer attributed to Sergeant that the Respondent did not even have to negotiate with the Union. Additionally, the demeanor of these two witnesses causes me to find that Sergeant should be credited in his denials of unlawful statements. Packer seemed unsure of the exact language used. In contrast, Sergeant impressed me as a prudent man who, on the record as a whole, was judicious in his conduct towards employees and the union situation. I credit his denials of making statements as alleged in paragraph 5(l) of the complaint and find that the Respondent did not violate Section 8(a)(1) of the Act as alleged in that paragraph.

H. March–Minnis

On a Saturday in early March 2003, employee Israel Hernandez Munoz was on his waste pickup route in a residential area in the East Valley of Phoenix. Supervisor Bill Minnis, who at the time was the project manager for the Arizona market, had a house on the route. The two men were friendly and talked regularly. Minnis maintained an office at the facility where Munoz was assigned, but Minnis had no supervisory authority or other work dealings with Munoz at that time. Minnis testified that Munoz considered him a friend and would call him daily to discuss work and personal matters. When Munoz got to his residence Minnis walked out to talk to him. Munoz testified that Minnis immediately asked him what he thought of the Union. Munoz said that he was neutral about the Union. Minnis told Munoz that the Union was not good. Munoz questioned Minnis about that statement as he was aware Minnis had worked for UPS, a union company. Minnis told him that he did not like the Union.

Minnis denied ever having a conversation at his residence with Munoz about the Union. He did recall, however, that he had a conversation with Munoz about the Union in the latter part of May 2003. Munoz had telephoned him to discuss some personal problems that Munoz was having. During their conversation Munoz asked what Minnis' opinion was concerning the Union. Minnis asked why he wanted to know and Munoz told him he was just curious. He told Munoz that in his opinion they did not need a union. He denied asking Munoz about his opinion for the simple reason he did not care.

The evidence shows that Minnis and Munoz talked very frequently about numerous subjects. Both men recalled the subject of the union coming up on one occasion, but their recollections were at variance as to when, where and what was said. I found Minnis to have the superior recall of the details regarding their discussion of the subject. He was definite in his recollection and impressed me as to having been somewhat puzzled by Munoz inquiry about his opinion of unions. Likewise his proclaimed indifference to Munoz' thoughts about unions seemed genuine. I credit Minnis' version of events. I conclude that Minnis did not unlawfully interrogate Munoz concerning his opinion of the Union and find that the General Counsel failed to prove this allegation by a preponderance of the evidence.

I. June 4–Bogard

The Respondent maintains the following no-solicitation rules: "Drivers, Helpers & Equipment Operators Handbook–January 1999." To ensure employee health, safety, and to provide for mutual protection, the following actions on the part of the employee are contrary to the health and safety of company employees and the public. These actions are therefore prohibited by WM personnel. Soliciting during working time, unless authorized by a supervisor or company official. (R. Exh. 13, pp. 2–3) Company Solicitation and Distribution Policy–1/1/2003 1. To avoid unnecessary harassment of other employees, an employee may not solicit signatures. (R. Exh. 6.) On June 4 brothers Mark and David Keene were leaving the Elwood facility after finishing their shifts. They encountered janitor Jose Mejia who was sweeping outside the office. At the same time Supervisors Jim Bogard and Robert Rodriguez were standing nearby under a shade tree taking a smoke break. While each witness had his own version of what happened next, there is not a major factual dispute as to what then occurred. The following are my findings as to what happened based on my assessment of the credited testimony. Mark Keene had offered Mejia his union pin, shaped like the State of Arizona. As the Keenes talked with Mejia, Bogard shouted several times, "he's still on the clock." Bogard testified he noticed this offer of the pin but could not hear what the employees were saying. Bogard approached the three employees and told the Keene brothers that Mejia was working. He recalled saying, "[Y]ou can't do that while the employee is on the clock. I said, I understand that you guys are off, but you can't solicit while Jose is still working." The Keenes remembered Bogard saying if he had to play by the rules, so did they. The Keene brothers then started to walk away. Bogard recalled as the brothers left, David said that he had been told that it was okay if they talked if they were on the clock. Bogard testified he said, "And I said no, that's not the right information. I said if you were both off the clock yes you may talk, and solicit your union material. I said but you guys are off the clock and Jose is on the clock, so you're not allowed to do that."

Mejia testified that he talked to the Keene brothers for approximately 15–20 seconds. Mejia testified that drivers frequently stop and talk to him while he is working and no supervisor had previously stopped him from talking to them. Also on June 4 driver Andy Romero stopped to talk with Mejia for what he estimated was less than a minute. Romero testified that he pointed at Mejia's union pin on his vest and gave him a thumbs-up sign. At that time Bogard came from the maintenance shop and told Romero he could not be doing that. Bogard testified that he saw Romero point at Mejia's union pin immediately before he told Romero to leave Mejia alone. Bogard also testified that it is not his normal practice to stop employees and admonish them when he sees them talking. Romero then left and went into the lavatory and Bogard also came in to the room. Romero asked Bogard whether he had a problem with him. Bogard told Romero, "Andy, don't be doing that." Romero kept questioning Bogard as to what he meant. Bogard testified that he said, "And I said no, Andy I don't have a problem, I said, you know the rules, I know the rules, if I have to play by them you need to play by them. And I made a comment that nobody needs a ULP." Bogard further testified that he was referring to the no-solicitation rule and that he interpreted the Respondent's rule to be, "Employees are not allowed to solicit, distribute, leaflets, brochures, pins, etcetera, to fellow employees that are both on the clock or off the clock, on worktime and work areas." Bogard admitted that he had not seen Romero try to distribute anything to Mejia and did not hear what their conversation (which was being conducted in Spanish and is a language he does not understand) was about.

Bogard's reference to a ULP was apparently misunderstood by Romero who thought he made reference to a "UPI." This caused Romero to later talk to his supervisor, Robert Rodriguez, about Bogard and the meaning of a "UPI". This conversation is discussed below. Bogard also spoke with employee Sam Wonderling on June 4, 2003. Wonderling saw another employee, Sedivy, drop something in the yard. He picked the item up and saw it was a union pin. Wonderling told Bogard that he had seen Sedivy drop something and then sought out Sedivy and asked him about the pin. Sedivy told him that the pin was not his. Wonderling then went to Bogard and told him that the item did not belong to Sedivy. Wonderling showed Bogard that it was a union pin. Bogard told Wonderling that, "If I have to play by the rules, you have to play by the rules." Bogard asked Wonderling if Sedivy was off the clock when he spoke to him, Wonderling said that he did not know. Wonderling then left. Wonderling called Bogard approximately 20 minutes later and told him he was sorry and was just kidding around with him. Bogard said that if he had to play by the rules, then Wonderling had to play by the rules and people do not get fired during union campaigns unless they do not follow the rules. Bogard then told Wonderling to call the Keene brothers and tell them that he was sorry for blowing up at them. Bogard told Wonderling that they, referring to Wonderling and the Keene brothers, were not going to cram "this shit" down his throat.

It is alleged that the supervisors unlawfully created the impression of surveillance of the employees' union activities. In the first instance involving the Keene brothers the evidence shows that the shade tree where the supervisors were standing was regularly used as a place where Respondent's personnel took breaks. The employees' activities on the Respondent's premises were in plain view of this vantage point and it was not shown that the employees were trying to conceal what they were doing. There is no evidence that the supervisors had made a special effort to place themselves at the shade tree in order to observe employees activities. A similar finding is made concerning Bogard happening upon Romero giving a thumbs-up to Mejia relative to his union pin. The evidence discloses nothing more than Bogard observed the Romero-Mejia conversation by happenstance. I conclude that the General Counsel has failed to prove by a preponderance of the evidence that Bogard and Rodriguez unlawfully created the impression of surveillance of the employees' open union activities while on the Respondent's premises. The General Counsel alleges that Bogard promulgated an overly broad and discriminatory rule prohibiting employees from discussing the Union during working time, threatened employees with stricter enforcement of Respondent's rules, and threatened employees with discipline for violating the stricter rule.

An employer violates Section 8(a)(1) of the Act when it prohibits employees from discussing union-related matters while allowing discussion of other nonwork related subjects during working time. *Trus Joist MacMillan*, 341 NLRB No. 45 slip op. 5 (2004); *Opryland Hotel*, 323 NLRB 723, 731 (1997); *McGaw of Puerto Rico, Inc*., 322 NLRB 438, 449 (1992); *Teksid Aluminum Foundry*, 311 NLRB 711 (1993); *Willamette Industries*, 306 NLRB 1010 fn. 2 (1992); *Emergency One, Inc.*, 306 NLRB 800 (1992). The Board distinguishes between union solicitation and other employee activity in support of union organizing. "'[S]olicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad." *W.W. Grainger*, 229 NLRB 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978). See *Lamar Industrial Plastics*, 281 NLRB 511, 513 (1986) (Board found that an employee did not engage in conduct lawfully proscribed by no-solicitation rules when she merely asked a coworker if she had a union authorization card.); *Sahara-Tahoe Corp.*, 216 NLRB 1039, 1039 (1975), enfd. in relevant part 533 F.2d 1125 (9th Cir. 1976) (Board held that an employee's act of introducing a union representative to a coworker, and her subsequent statement that the coworker would go along with the union, did not constitute solicitation for which the employee could be disciplined under the employer's no-solicitation rule.); *Wal-Mart Stores* (Employee's invitations to fellow workers to attend a union meeting did not constitute conduct properly prohibited by the Respondent's no-solicitation rule, even though the invitations were extended during working time.) The record shows that the Respondent did not restrict casual work conversations among employees for any matters other than union activity as noted above in regard to the Keene brothers, Wonderling and Romero. The evidence further demonstrates that the conversations between the employees in the cited incidents were brief, were not shown to have materially interrupted work, or to have been out of the ordinary in the everyday business milieu of the Respondent–other than the subject under discussion involved the Union. The General Counsel does not allege the Respondent's no-solicitation rule is unlawful but does assert that Bogard's

interpretation of the rule was unlawful. The Board has held that in the context of a union campaign, "'[s]olicitation' for a union usually means asking someone to join the union by signing his name to an authorization card." *W.W. Grainger, Inc.*, supra. However, an integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at that time. As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working. Solicitation is therefore subject to rules limiting it to nonworking time. The Board additionally has held that casual work conversation that may cause short interruptions of work does not normally violate a valid no-solicitation rule. The Board has found that simply informing another employee of an upcoming meeting or asking a brief, union-related question does not occupy enough time to be treated as a work interruption in most work settings. *Wal-Mart Stores*, supra; *Flamingo-Hilton-Laughlin*, 324 NLRB 72, 110 (1997); *Lamar IndustrialPlastics*, 281 NLRB 511, 513 (1986); *Greensboro News*, 272 NLRB 135, 138 (1995), enf. denied on other grounds 843 F.2d 795 (4th Cir. 1988); *W.W. Grainger*, supra at 161 fn. 2, 166–167.

I find that the activity engaged in by the Keene brothers, Romero and Wonderling was not solicitation as defined by the Board and was not a violation of the Respondent's published no-solicitation rule. I further find that Bogard did discriminatorily more strictly enforce the Respondent's no-solicitation rule against employees because they were engaged in brief union discussions. This enforcement by its nature included a ban on the employees discussing union matters while not prohibiting workplace discussions on other subjects and thus was overly broad and discriminatory. Disparate enforcement of a no-solicitation rule is unlawful. *Funk Mfg. Co.*, 301 NLRB 111, 113 (1991). To the extent Bogard warned the employees that they should not be engaging in such conversations, I additionally find that this implies the threat of discipline for any failures to comply with his admonitions. I conclude that by this enumerated conduct the Respondent did violate Section 8(a)(1) of the Act.

J. June 4–Rodriguez

The General Counsel alleges that on June 4, 2003, Robert Rodriguez, a route supervisor, committed four unfair labor practices directed at employees' union activities by threatening employees with unspecified reprisals, creating the impression of surveillance, promulgating an overly broad rule prohibiting employees from talking about the Union during working time, and threatening employees with stricter enforcement of its rules. On June 4, 2003, employee Lazarito "Andy" Romero was concerned that supervisor Jim Bogard was causing trouble for him. As a result of this concern Romero sought out Rodriguez, who was his immediate supervisor, to discuss the matter. Romero explained to Rodriguez that his concern centered on a statement that Bogard had made to him that he was going to write Romero up a "UPI." Rodriguez told Romero that he would look into the matter. Romero asked Rodriguez who his supervisor was and Rodriguez said that he was his supervisor but Bogard was also a supervisor. Rodriguez then told Romero that they were just getting tired of the employees rubbing their noses in this all the time. Romero asked what Rodriguez meant and was told that the employees were always talking on the radio about "this" all the time. Rodriguez then told Romero that he saw Romero passing out union flyers. Romero testified that Rodriguez said, "We are going to go by the rules." Rodriguez testified that the day before he had seen Romero take paperwork into the mechanics' shop and he later went into the shop and asked the shop supervisor, Terry Deal Sr., what Romero had. Deal gave him a piece of paper that was an invitation to a union luncheon. Rodriguez testified that Romero asked if he could hand out such papers. Rodriguez testified that he told Romero, "no soliciting." He further explained to Romero that he could not be handing out paperwork while "they're on duty and you're off duty in the workplace." Rodriguez denied that he ever mentioned anything to Romero about talking on the radio to other employees. He noted further that this was not even possible because Romero could only talk to dispatchers or him. Rodriguez also denied saying anything about going by the rules. I find that Rodriguez' inquiry of a fellow supervisor about a flyer that Romero had given him in the Respondent's shop and then mentioning that fact to Romero does not violate the Act as creating the impression of surveillance. I conclude Rodriguez did not unlawfully create the impression of observing employees' union activities in the work place and that his mention of what he observed would not reasonably tend to interfere with, restrain or coerce employees in the exercise of their Section 7 rights under the Act. I find that Rodriguez did complain about the Respondent being tired of employees rubbing the Respondent's nose in it and that this was a reference to the employees' union activities. I conclude that this statement was an implied threat based on the employees' union activities. I conclude the statement did tend to interfere with, restrain and coerce employees in the exercise of their Section 7 rights and was a violation of Section 8(a)(1) of the Act. I further find that Rodriguez did make the statements of "no-solicitation," that the Respondent was going to go by the rules, that employees could not hand out union materials in the workplace and these statements were references to the Respondent's no-solicitation rule. The Board distinguishes between union solicitation and other employee activity in support of union organizing. "'[S]olicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad." *W.W. Grainger*, 229 NLRB 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978). The Board has held that this type of minimal conduct does not amount to solicitation. *Wal-Mart Stores*, 340 NLRB 637, 638, 639 (2001) I conclude, therefore, that the Rodriguez' statements concerning no-solicitation when applied to the conduct that Romero had engaged in were an overly broad application of the Respondent's no-solicitation rule and threatened employees with stricter enforcement of its rules because they had engaged in union activities. I conclude such conduct violates Section 8(a)(1) of the Act.

K. June 4–Mullens

The complaint alleges that on or about June 4, 2003, Route Supervisor Rick Mullens, "interrogated its employees as to their union sympathies by soliciting its employees to wear 'Vote No' buttons." Employee Sam Wonderling testified that he was in the South Yard dispatch office in early June 2003.

Mullens was in the office along with some employees who included Leo Garcia. As Wonderling did paperwork he heard Mullens say to Garcia, "Do you want one of these?" Wonderling observed that Mullens was holding a cardboard box from which he took a pin and offered it to Garcia. Wonderling saw that the pin displayed the words, "DIJO NO." Wonderling testified that it was his understanding that the words are Spanish for, "vote no." Garcia said he did not want the pin and Mullens left the office. Wonderling recalled seeing a couple of employees and Supervisor Alan Rush wearing the pins around the same time. Mullens testified that he saw some buttons that he believed were left over from a previous union campaign in the dispatch office. He recalled that he took one of them and put in his desk drawer. He remembered that he was later informed in a supervisors meeting that the buttons "were not recommended" and the Respondent would make up new buttons. He testified that since the buttons were just "causing trouble" he threw his away. Mullens denied ever offering a pin or button to anyone. I found Wonderling's demeanor and detailed recollection of the event was persuasive that he was accurately recalling what Mullens said and did on this occasion. Mullens in contrast admitted handling antiunion buttons and seemed uncertain in his testimony as to exactly what their purpose was and how he was to use them. I credit Wonderling's testimony. The Board has held that offering "vote no" buttons to employees is a means of interrogating them as to their union sympathies. *Houston Coca-Cola Bottling Co.*, 256 NLRB 520 (1981); *Kurz-Kasch*, 239 NLRB 1044 (1978). I conclude that by offering Garcia the vote no pin the Respondent violated Section 8(a)(1) of the Act.

L. June 18–Minnis

On or about June 18, Bill Minnis, operations manager, and Wonderling had a conversation at the Elwood facility. Wonderling testified that Minnis asked him what the issues were and that he could fix them. Wonderling told him that he was uncertain about what Minnis was referring to and the subject was dropped. Minnis testified that he had a discussion with Wonderling about numbering trash containers, a suggestion that Wonderling had previously made to him. Wonderling then said that because of legal issues he could not discuss any more of the problems. Minnis testified that he told Wonderling he was not talking about "issues" but was specifically talking about missed pickup problems. The General Counsel alleges that this conversation violated the Act because it amounted to "soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activity." I found Minnis by his demeanor and solid recollection to have the most accurate memory as to what was said in this conversation. Wonderling by contrast impressed me as having a less complete recall of the event. I credit Minnis' testimony and find that nothing he said on this occasion violated Section 8(a)(1) of the Act.

M. July 18–Bogard

On about July 18 Wonderling was driving a new route and was having difficulty completing the work. He radioed the dispatch office to notify them that he might require some assistance to finish the route. Supervisor Jim Bogard contacted Wonderling who explained his difficulty. According to Wonderling, Bogard told him that he may want to look for a job with another waste company, specifically Arizona Waste, because he was not sure how much longer Wonderling would have a job with Waste Management. When Wonderling did not reply, Bogard told Wonderling not to "let those big tears rust his steel-toed boots." Bogard testified that on July 17 he had overheard Wonderling boasting to a fellow driver that he (Wonderling) was the number one relief driver and that he would have no problem completing that driver's route the following day. Thus the next day when Wonderling complained about not being able to finish the route, Bogard said he kidded him for his braggadocio. Bogard remembered saying to Wonderling that he had heard him telling the regular driver the day before that he would complete the route easily. Bogard gave him the boundaries of the route and then asked him if he knew about a big red truck in town that Carlos drives. This was a reference to another local waste hauler's red colored trucks. Wonderling replied he did know about the trucks. According to Bogard he then told Wonderling that he would look good in one of those. He then said to Wonderling, since he was complaining about the route, not to let "those tears rust those steel toed boots." Bogard impressed my as having the best recollection of the conversation and the background of that conversation. I found that Wonderling's recollection of what was said was not as convincing and conclude that Bogard was indeed merely joking with Wonderling because of his predicament that day. I credit Bogard's version of the conversation and conclude that nothing in his remarks was based on Wonderling's union activities and was intended to be nothing more than an attempt to engage in teasing of a fellow employee. I conclude that Bogard's remarks to Wonderling were not a threat to Wonderling that he might be losing his job or an invitation to seek alternative employment because of his union activities. Likewise, I find that the remarks were not intended as disparaging comments directed at an employee because of his union sympathies. I conclude Borgard's remarks on this occasion were not a violation of Section 8(a)(1) of the Act.

N. August 2

The Respondent has a policy that drivers and mechanics dress in company uniforms, including caps, while at work. The General Counsel alleges that there was disparate application in the administration and/or enforcement of the rule when applied to hats that bore union insignia. On or about August 2 employee Israel Hernandez Munoz was working on a residential route. Munoz was dressed in a Waste Management uniform but was wearing a union baseball cap. Rush met Munoz on the route in order to assist him in locating a particular dumpster. Rush observed that Munoz was not wearing a Waste Management cap. Rush told Munoz that he could only wear company hats and told him to take off the union baseball cap. Munoz took his union hat off and continued working. Rush had left at this point and Munoz called him on the truck radio and asked to speak to him. The two men then met again and Munoz asked Rush why he was not allowed to wear the hat. Rush told him that he was only allowed to wear Waste Management hats.

Munoz asked Rush why other drivers were permitted to wear non-Waste Management hats. Rush said that he was going to talk to those individuals as well. The evidence shows that some other drivers wore noncompany hats while at work. These hats included one with a skull on the back, various professional baseball caps, a Viagra racing team hat, and a MAC hat. While there is some evidence that Rush chastised other employees for wearing noncompany hats around the time that he spoke to Munoz there is a lack of showing that the Respondent rigidly enforced its uniform policy relative to the hats employees wore. I find that the evidence shows the Respondent did not strictly enforce its policy of drivers wearing only company hats. I find that Rush's instruction to Munoz to remove his union baseball cap was a discriminatory application of the Respondent's ephemeral hat policy, and I conclude that such disparate restriction regarding the union hat was a violation of Section 8(a)(1) of the Act.

O. Termination of Troy Hoekstra

Troy Hoekstra started work driving for the Respondent in August 1995. Hoekstra became involved with the Union in the late January 2003 when he started talking to other employees about the Union, attended union meetings, and became a member of the organizing committee. Hoekstra's name was listed on the union's initial flyer that was passed out to employees starting on February 20 and was admittedly seen by management. As noted above, the credited evidence shows that Rush was knew of Hoekstra's union sympathies, having unlawfully interrogated him about that matter.

1. January 23, 2003

The Respondent provides Nextel two-way radios in its trucks. On or about January 23, 2003, Hector Gonzalez, the Nextel technician who services radios at Waste Management's Elwood facility, was at that location in the dispatch office performing routine maintenance. Most of the radios are "closed" because they only have the limited capacity to communicate with a route manager, a dispatcher or a mechanic. A few of the radios, however, are "open" and can communicate with any other Nextel subscriber. Hoekstra was also in the dispatch area of the Elwood facility on January 23, along with Rush and Dispatcher, Frank Elliot. Rush asked Hoekstra if he had an "open" radio in his truck. Hoekstra replied that he did have an open radio. Rush asked Hoekstra why he had an open radio and Hoekstra said "V.I.P." and laughed. Rush then said to Gonzalez, "Radio 403451(Hoekstra's truck), shut it off." Rush and Gonzalez testified that Rush winked at Gonzalez when he said to shut off the radio. Rush testified that the remark was a joke offered in response to Hoekstra asserting that he was a V.I.P. Hoekstra testified that he then asked Rush why he was shutting off his radio and then accused Rush of turning off the radio in order to prevent him from talking freely about the Union on the radio. When he said that, Rush told Hoekstra to come into his office. The two men went into Rush's office and, according to Hoekstra's testimony, Rush told him that the employees who were trying to organize the Union were "pussies" and would not back Hoekstra because they did not back Rush on anything either. Rush continued talking and said that he had been in an argument with District Manager Jason Rose earlier that day and he was not afraid of being fired as he had a Commercial Driver's License and could get a job anywhere. Rush pulled out his license and showed it to Hoekstra. Rush finished by telling Hoekstra that he could only trust his family, meaning his wife. Hoekstra listened to Rush, without saying much, and left soon after Rush told him he could trust no one. Hoekstra's open radio was not turned off at the time. Gonzalez testified that he thought that Rush's instruction was a joke and took no action on the matter. After Hoekstra left the Respondent's employment that open radio was turned off. The General Counsel argues that the Respondent unlawfully "removed the capability for a two-way radio from" Hoekstra's truck on or about January 23, 2003. The evidence is to the contrary. The radio in Hoekstra's truck was not modified during his employment. I find from the testimony of the three witnesses to the conversation about the radio that the credited evidence shows that Rush's remarks were nothing more than a joking response to Hoekstra's boast that he was a VIP. I find that the Respondent did not cancel Hoekstra's two-way radio and did not violate Section 8(a)(1) and (3) of the Act as alleged. The General Counsel also alleges that Rush's remarks to Hoekstra when they went into Rush's office amount to telling employees that it would be futile to select the Union as their collective-bargaining representative. The evidence sustains this conclusion. I credit Hoekstra's testimony as to what was said in the privacy of the office. I find that Rush's remarks about the employees interested in the union not backing Hoekstra in his organizing efforts was an unlawful expression of the futility of the employees seeking representation by the Union. I conclude that Rush's remarks are a violation of Section 8(a)(1) of the Act.

2. Hoekstra's pay dispute

Paragraph 6(b) of the complaint alleges that on or about February 23, 2003, the Respondent unlawfully reduced Hoekstra's pay because of his union activities. The Respondent denies reducing Hoekstra's pay for unlawful reasons and asserts he was paid properly for the work that he performed during the period in question. In March 2001 Hoekstra changed assignments and began driving a truck and trailer. His Personnel Action Request form reflected that his pay changed with his new duties from $15.91 base pay per hour plus incentive to a "flat rate" of $18.30. Hoekstra and Kevin Harring were the two drivers that regularly drove a truck-trailer. They both testified that they were paid on a flat rate basis for that assignment. The Respondent presented witnesses who testified that Hoekstra's pay was calculated as an hourly rate plus maximum incentive. This meant that since he regularly drove a truck and trailer he was paid at the highest maximum rate. The Respondent's witnesses testified further that the higher rate was paid only when Hoekstra and Harring actually drove with a trailer at least 60 percent of the time during a workweek. Absent performing work at that level the two were paid at the lesser regular driver rate because they were driving standard trash trucks. Hoekstra's pay became an issue on about February 21, 2003, when he received his paycheck and noticed he was paid less than his usual amount. Shortly thereafter Hoekstra angrily confronted Rush about the matter and this ultimately resulted in Hoekstra being terminated for insubordinate conduct. The Respondent's expla-

nation for the lesser pay in that particular check was that there had been heavy rains during the payweek and this prevented Hoekstra from driving his truck-trailer the required 60 percent of the time during the week. The Respondent's pay records show that in November 2001, several months after Hoekstra was assigned the truck-trailer, both Hoekstra and Harring were shown to have received a change in base rate from $15.91 to $16.39. They both were shown to have a new high incentive rate of pay of $18.85. Pay records for November 2002 show increases in the base rate for the two men to $16.72. Sergeant and Rush gave uncontroverted testimony that in November 2002 Hoekstra was paid less than the maximum rate because he supposedly had not driven the truck-trailer the requisite percentage of time during the week. Hoekstra complained about his pay and they investigated the matter. It was discovered that he had actually driven the truck-trailer 60 percent of the time. Hoekstra was informed of the error and he was given the correct amount of pay retroactively. The Respondent also offered the testimony of Respondent's human resource coordinator, Dora Akers, concerning Harring's pay records. Her testimony credibly showed that Harring had received less than the maximum incentive rate when he did not drive a tractor-trailer at least 60 percent of the week. Based on the record as a whole I find that the General Counsel has not established by a preponderance of the evidence that Hoekstra was to be paid at the highest incentive rate regardless of what work he performed. Rather, I conclude the evidence shows he was paid a base rate and received the highest incentive rate only when he performed his usual truck-trailer driving duties more than 60 percent of the time during the work week. I conclude that on or about February 21 the Respondent did not unlawfully reduce Hoekstra's pay because of his union activities and, therefore, did not violate Section 8(a)(1) and (3) of the Act as alleged.

On February 21 Hoekstra was at the Elwood facility at the end of the workday. He received his paycheck and noticed that his hourly rate had been reduced which amounted to approximately a $16 difference in what he would commonly receive. Hoekstra went to discuss the reduction with Rush. He found Rush standing in the hallway near the dispatch office and the driver's room talking with drivers Mark Williams and Eddie Gregg. The hallway is a fairly busy area used frequently by drivers and other employees. Several of Respondent's employees and supervisors were in the immediate area at the time that Hoekstra approached Rush and asked about his pay. Rush explained to Hoekstra that pay was less because it was based on the fact that it had rained and Hoekstra was unable to pull his trailer for a week.

Hoekstra became incensed by Rush's answer. What occurred next is not in serious dispute and several witnesses, including Hoekstra, testified regarding his ensuing outburst directed at Rush. Hoekstra started screaming at Rush that "this is f–king bull shit." Rush told Hoekstra to calm down and to come to his office so they could discuss the matter. Hoekstra, however, ignored his request and continued unabated to say such things as "Why are you f–king with me? You're f–king me because we're for the Union." "This is not f–king Rush Management." "You can't f–king do this." "This is f–king wrong." Rush kept attempting to assuage Hoekstra's anger and telling him to come to his office to discuss the pay dispute. Hoekstra would not go to the office and repeatedly cursed Rush until finally Rush stated "enough" and again asked Hoekstra to his office. Hoekstra, however, disregarded that request and clocked out. Hoekstra started walking out the door and then turned and said to Rush, "Just remember, what goes around, comes around."

A three-person supervisory committee determined to terminate Hoekstra after reviewing investigatory statements taken from some persons who had witnessed his conduct. Hoekstra was not interviewed about the incident, but as noted, he freely admitted to his outburst. Respondent's records state that Hoekstra was terminated for using obscene and abusive language, and for failing to follow the orders of a supervisor.

3. Analysis of Hoekstra's termination

The General Counsel contends that the Respondent discriminated against Hoekstra because of his union activity and that he would not have been fired absent that motivation. The General Counsel points to the record evidence that the use of profanity is common by the Respondent's drivers and that other employees have had boisterous disputes with supervisors that have not resulted in their terminations. The Respondent argues that Hoekstra's conduct was extraordinarily insubordinate and was the sole reason for his discharge.

a. Alleged disparate treatment

The General Counsel introduced evidence that the Respondent had not terminated any employee for conduct that is alleged to be similar to that engaged in by Hoekstra. The Respondent argues that the conduct of the noted employees was not of the same magnitude of that engaged in by Hoekstra. I have examined the instances shown by the General Counsel's evidence and find that while several employees did engage in loud and questionable conduct, that the record as a whole does not support the conclusion that Hoekstra's conduct was necessarily similar. Hoekstra was shown to have been highly confrontational to the point of irrationality in dealing with a $16 wage dispute. He did so in a profane and somewhat threatening manner in an open area in front on several employees and supervisors. Hoekstra repeatedly refused to follow Rush's order to come to his office to discuss the matter in private. In sum, I find that Hoekstra's conduct was shown to be extraordinary and the Respondent's reaction to his conduct was not proven by a preponderance of the evidence to be disparate treatment.

b. Protected concerted activity

Under the Act, Respondent could discharge Hoekstra for good cause, or even no cause, so long as the discharge was not motivated by his exercise of protected rights guaranteed by Section 7 of the Act. In order for activity to be protected by the Act, it must be concerted in nature. *National Wax Co.*, 251 NLRB 1064 (1980). An employee's activity will be deemed concerted, when it is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *KNTV, Inc.*, 319 NLRB 447, 450 (1995); *Pacific Electricord Co. v. NLRB*, 361 F.2d 310, 310 (9th Cir. 1966), enfg. 153 NLRB 521 (1965). In certain circumstances, the Board has found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to

the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Hoekstra's complaint to Rush was twofold in that it involved his individual pay dispute and his perception that the reduced pay was the result of his union activity. I find that Hoekstra's questioning of his reduced pay was based upon his belief that his union activities had caused the reduction. I further find that such a protest was protected concerted activity in that it involved a statutorily protected right of all of Respondent's employees to engage in such activities without retribution and was of mutual concern to such employees. *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

Not all concerted activities, however, are protected under Section 7 of the Act. Thus, where an employee engages in indefensible or abusive conduct, his concerted activity will lose the protection of the Act. Whether the Act's protection is lost depends on a balancing of four factors: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814 (1979). Where profane and other offensive conduct occurs in the context of protected concerted activity that potentially removes the conduct from the protection of the Act, the *Atlantic Steel* test is used rather than the traditional analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See *Aluminum Co. of America*, 338 NLRB 20, 21 (2002); *Honda of America Mfg.*, 334 NLRB 751, 753 (2001). Applying the *Atlantic Steel* factors to Hoekstra's situation the record evidence shows the following. First, the place where the discussion took place was not a private area but rather the dispatch hallway where Hoekstra's conduct was witnessed by several employees and supervisors. His shouting was extremely loud and could be heard over a wide area. His language was profane, degrading of a supervisor in front of others, and somewhat threatening. Rush repeatedly attempted to get Hoekstra to accompany him to the supervisor's office to discuss the matter privately but Hoekstra refused to acquiesce and left the premises while stating that "what goes around comes around." I find that the first factor weighs against Hoekstra's actions being protected by the Act. Second, the discussion was about Hoekstra's wages and his perception that they had been unfairly altered because of his union activities. I find that the second factor weighs in favor of finding that the discussion was protected activity. Third, Hoekstra's outburst was loud, abusive, widely witnessed and insubordinate towards supervisor Rush who attempted to defuse the situation. Rush did not respond in kind to Hoekstra's tirade. I find that the nature of Hoekstra's conduct militates against it being protected under the Act. Fourth, the outburst was not provoked by the Respondent. As found above, the $16 difference in pay was not shown to have resulted from Hoekstra's union activities. Additionally, nothing that Rush did on this occasion has been shown to resemble provocation of Hoekstra so as to cause or exacerbate the situation. Simply put, Hoekstra was very angry and would not listen to Rush's efforts to calm the waters. I find that the lack the Respondent's unfair labor practices relative to Hoekstra's pay situation dictates against finding his actions protected. In sum, Hoekstra's conduct exceeded the bounds of what the Act will sanction and he lost the protection of the Act by engaging in that egregious conduct. I conclude that the Respondent's discharge of Hoekstra did not violate Section 8(a)(1) and (3) of the Act. *Trus Joist MacMillan*, 341 NLRB No. 45 slip op. 2 (2004); *Aluminum Co. of America*, supra; *Piper Realty Co.*, 313 NLRB 1289 (1994).

P. Termination of David Keene

1. Background concerning David Keene

David Keene was employed by the Respondent starting in 1993 and worked as a commercial front-load truckdriver. He was a member of the Union organizing committee from approximately January 2003, until his discharge on July 24, 2003. His union activities included distributing union materials to employees and he was named in union fliers as a member of the organizing committee. On July 24, 2003, Bogard terminated David Keene, pursuant to the Respondent's established policy that punished employees with firing for having three chargeable accidents within a 12-month period. The Respondent defines a chargeable accident as an accident where the driver was at fault. The Respondent attributed Keene's discharge to damage it determined he had caused a few days earlier to a pickup truck that was parked next to a driveway at All-Pro Fence, one of Respondent's customers in Mesa, Arizona. Keene had been involved in two previous chargeable accidents, on August 22, 2002 (unsafe lane change), and July 9, 2003 (Running over a median strip and knocking down a light pole.)

2. The All-Pro accident and Respondent's investigation

On July 8, 2003, a day before his second chargeable accident, Keene's route included servicing All-Pro Fence. Keene drove his usual green and white front-load truck on this date. On that date one of All-Pro's employees had parked his primer gray pickup truck next to the company's drive way entrance. That pickup truck sustained damage to the rear end on July 8 which included green paint from the vehicle that had hit the parked truck. Keene's truck was painted green. There were no witnesses to the accident.

On Friday, July 11 Keene again was routed to All-Pro in the normal course of his duties. When he arrived there a female employee of All-Pro talked to him about the damaged pickup. Keene denied any knowledge of the accident. It was noted during their conversation that the Respondent's Port-a-Let truck had serviced the premises on Tuesday and Friday and that another trash hauling company, Paradise, had serviced the business across the street. Keene speculated that these trucks might have caused the damage. The female employee, Lortie, told Keene that one of Respondent's supervisors from the Port-a-Let division had come to the company about the accident but had not contacted her afterwards. Keene then radioed Bogard who was his supervisor and explained the situation to him. Bogard replied that the Port-a-Let supervisor was looking into the situation and would be in touch with Bogard if there were any problems.

Keene next returned to All-Pro on Tuesday, July 15. When Keene was leaving the owner of the pickup stepped on to the

running board of Keene's truck and told him he would not get off until he could speak to one of Respondent's supervisors. Keene radioed Bogard and explained the situation. Bogard immediately drove to the All-Pro premises where he spoke to the owner of the pickup. At the end of the day Bogard and Keene discussed the situation and Keene denied any knowledge of the accident. Bogard said he would investigate the situation.

Bogard proceeded to investigate the accident. His investigation included matching the truck that Keene had been driving up next to the pickup truck damage, taking photos and measurements. Following his examination of the matter he informed Keene that the damage seemed to match up with Keene's truck including the paint colors. The Respondent presented extensive evidence at the hearing detailing the investigation and the results. I find that the evidence shows Bogard's investigation was a reasonable and relatively thorough effort to determine if Keene had caused the damage to the pickup truck. Bogard's investigation concluded that David Keene had been the cause of the damage to the pickup and, as a result, he was terminated. Keene's testimony about the All-Pro accident was not persuasive. He denied that he was involved in an accident with the pickup. He further testified that the damage to the pickup truck did not match up with the trash truck he was driving the day of the accident. The sworn affidavit he gave to the Board during the investigation of the case contradicted this denial: "Monday, it could not be arranged, but we all met out there finally on Tuesday and compared the vehicles and heights of the hit, which did match."

3. Analysis of D. Keene's discharge

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Electromedics, Inc.*, 299 NLRB. 928, 937 (1990), enfd., 947 F.2d 953 (10th Cir. 1991); *Presbyterian/St. Luke's Medical Center*, 723 F.2d 1468, 1478–1479 (10th Cir. 1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

David Keene was shown to have been an active and open supporter of the Union. His activities included being a member of the union organizing committee beginning in January 2003. He also distributed union pins, fliers with his name on them, and bumper stickers. He and his brother were warned by Respondent's supervision about conducting union business on the Respondent's premises. I find that the Respondent had knowledge of his union support prior to his discharge and that the timing of his discharge was contemporaneous with his union activities. As to the element of animus, the Respondent has been found herein to have engaged in certain unfair labor practices, thus I further find that the General Counsel had established the necessary preliminary showing that Keene's discharge could have been connected to his union activities. The Respondent has presented persuasive evidence that Keene caused the third accident that led to his discharge and that it simply followed its established policy when it terminated him for having a third chargeable accident in a 12-month period. I find that the Respondent has proven that it would have discharged D. Keene for his third accident regardless of his union activities. I conclude that the Respondent did not violate Section 8(a)(1) and (3) of the Act by its termination of David Keene.

CONCLUSIONS OF LAW

1. Waste Management of Arizona, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[3]

ORDER[4]

The Respondent, Waste Management of Arizona, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union sympathies or activities.

(b) Threatening employees with reduced pay, benefits, or onerous working conditions if they select the International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL–CIO, or any other labor organization as their collective bargaining representative.

(c) Creating the impression that employees union activities are under surveillance.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

4 The Respondent submitted a posthearing errata sheet detailing certain discrepancies in the record as recorded. No opposition was filed regarding those corrections and I receive the sheet into evidence as R. Exh. 57.

(d) Threatening to discharge or to refuse to hire union supporters.

(e) Soliciting employee grievances and promising them improved wages, benefits or better working conditions if they withhold support from the Union.

(f) Promulgating and enforcing overly broad and discriminatory no-solicitation and no-distribution rules and removing union literature from employee vehicles parked in Respondent's parking lots.

(g) Promulgating or enforcing a discriminatory rule that prohibits employees from discussing the Union during working time or threatening employees with stricter enforcement of the Respondent's no-solicitation rules.

(h) Threatening employees with unspecified reprisals for engaging in union activity.

(i) Disparately enforcing the Respondent's policy requiring employees to wear company hats.

(j) Telling employees that it would be futile to support the Union.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, revoke, and cease enforcing the discriminatory overly broad no-solicitation/distribution rules against employees.

(b) Rescind the rule discriminatorily prohibiting employees from discussing union matters at work while permitting all other discussions.

(c) Within 14 days after service by the Region, post at its facilities in the Phoenix, Arizona area, copies of the attached notice marked "Appendix."[5] Copies of the notice written in both English and Spanish, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in both English and Spanish to all current employees and former employees employed by the Respondent at any time since January 20, 2003. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: August 16, 2004.

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees concerning their union sympathies or activities.

WE WILL NOT threaten employees with reduced pay, benefits or onerous working conditions if they select the International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL-CIO, or any other labor organization as their collective bargaining representative.

WE WILL NOT create the impression that employees union activities are under surveillance.

WE WILL NOT threaten to discharge or to refuse to hire union supporters.

WE WILL NOT solicit employee grievances and promise them improved wages, benefits or better working conditions if they withhold support from the Union.

WE WILL NOT promulgate and enforce overly broad and discriminatory no-solicitation and no-distribution rules and remove union literature from employee vehicles parked in Respondent's parking lots.

WE WILL NOT promulgate or enforce a discriminatory rule that prohibits employees from discussing the Union during working time or threatening employees with stricter enforcement of the Respondent's no-solicitation rules.

WE WILL NOT threaten employees with unspecified reprisals for engaging in union activity.

WE WILL NOT disparately enforce our policy requiring employees to wear company hats.

WE WILL NOT tell employees that it would be futile to support the Union.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind, revoke, and cease enforcing the discriminatory overly broad no-solicitation/distribution rules against employees.

WE WILL rescind the discriminatory rule prohibiting employees from discussing union matters at work while permitting all other discussions.

WASTE MANAGEMENT OF ARIZONA, INC.